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No. 15-497

In the Supreme Court of the United States

STACY FRY, BRENT FRY, AND EF, A MINOR, BY HER NEXT FRIENDS STACY FRY AND BRENT FRY,

Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, AND PAMELA BARNES, IN HER INDIVIDUAL CAPACITY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

The Handicapped Children's Protection Act of 1986 (HCPA), 20 U.SC. § 1514(l), requires exhaustion of state administrative remedies under the Individuals with Disabilities Education Act (IDEA) for non-IDEA actions "seeking relief that is also available under" the IDEA. The question presented, on which the circuits have persistently disagreed, is:

Whether the HCPA commands exhaustion in a suit, brought under the Americans with Disabilities Act and the Rehabilitation Act, that seeks damages – a remedy that is not available under the IDEA.,

PARTIES TO THE PROCEEDING

Petitioners Stacy Fry and Brent Fry, as next friends of minor E.F., were plaintiffs-appellants in the proceedings below

Respondents Napoleon Community Schools, the Jackson County Intermediate School District, and Pamela Barnes, were defendants-appellees in the proceedings below.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 788 F.3d 622. The opinion of the district court (Pet. App. 37-50) is reported at 2014 WL 106624.

JURISDICTION

The court of appeals entered judgment on June 12, 2015, and denied rehearing *en banc* on August 5, 2015. Pet. App. 53-54. The petition for *certiorari* was filed on October 15, 2015, and granted on June 28, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant provisions of the Rehabilitation Act of 1973, the Handicapped Children's Protection Act of 1986, the Individuals with Disabilities Education Act, and the Americans with Disabilities Act of 1990, as well as of the Americans with Disabilities Act's implementing regulations, are reprinted at Pet. App. 55-98.

STATEMENT OF THE CASE

This case involves a school district that refused to allow a girl with cerebral palsy to be accompanied by her service dog at school, in violation of the Americans with Disabilities Act (ADA) and the Rehabilitation Act. The district barred the dog, it said, because its decision to provide one-on-one support from a human aide satisfied its obligations under a *different* statute—the Individuals with Disabilities Education Act (IDEA). When the girl and her parents sued to enforce their rights under the ADA and the Rehabilitation Act, the

school district said that the family should first have sought relief in administrative proceedings under the IDEA. In the Handicapped Children's Protection Act (HCPA), however, Congress specifically provided that the IDEA does not excuse school districts from complying with the ADA, the Rehabilitation Act, "or other Federal laws protecting the rights of children with disabilities." 20 U.S.C. § 1415(*l*). Congress required exhaustion of IDEA proceedings *only* when the "civil action" bought under one of those other statutes is "seeking relief that is also available under" the IDEA. *Id.* Even though the family did not contest the district's position that the school had complied with the IDEA, and even though the relief the family sought in its lawsuit—principally, damages—was not of a form that IDEA proceedings can provide, the lower courts agreed with the district and dismissed the suit. Petitioners respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Sixth Circuit.

A. The Statutory Framework

This case requires the Court to address the interplay between the IDEA and other federal statutes that protect children with disabilities. Congress specifically set the terms of that interaction in the HCPA.

1. The Individuals with Disabilities Education Act—The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, "requires States receiving federal funding to make a 'free appropriate public education' (FAPE) available to all children with disabilities residing in the State." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 232 (2009) (quoting 20

U.S.C. § 1412(a)(1)(A)). The statute defines a "free appropriate public education" as "special education and related services" that are provided at public expense, meet state standards, include an "appropriate" education, and "are provided in conformity with the individualized education program." 20 U.S.C. § 1401(9); see also 20 U.S.C. § 1414(d) (requiring an individualized education program (IEP) for each child with a disability). The statute defines "special education" as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability." 20 U.S.C. § 1401(29). And it defines "related services" as supportive services that "may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26).

This Court has declined to establish a comprehensive test for determining when a school has satisfied its obligations to provide a FAPE. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 202 (1982) ("We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act."); see also *Endrew F. v. Douglas County Sch. Dist. RE-1*, 136 S. Ct. 2405 (2016) (inviting the Solicitor General to file a brief in a case presenting that question). But it has made clear that the determination of whether a school district has provided a FAPE turns on the "educational benefit" received by the child. *Rowley*, 458 U.S. at 200-203. Thus, the IDEA may compel a school district to teach a student with a disability to use a service dog in some

contexts.[1] And the statute may require the district to allow the student to be accompanied by a service dog when doing so is "required to assist" the child "to benefit from special education." 20 U.S.C. § 1401(26).

The "procedural safeguards" mandated by the IDEA, 20 U.S.C. § 1412(a)(6), underscore the statute's focus on educational benefits. As relevant here, those safeguards require schools to provide "[a]n opportunity for any party to present a complaint" regarding "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6)(A). If a parent presents a complaint, and the parties do not settle following mediation or a mandatory resolution session, see 20 U.S.C. § 1415(e), (f)(1)(B), the matter proceeds to "an impartial due process hearing" conducted by the state or local educational agency, 20 U.S.C. § 1415(f)(1)(A). The statute generally requires the hearing officer to make a decision "on substantive grounds based on a determination of whether the child received a free appropriate public education." 20 U.S.C.

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[1] See 34 C.F.R. § 300.34(c)(7)(ii)(B) ("related services" include "teaching children" to "use the long cane or a service animal to supplement visual travel skills or as a tool for safely negotiating the environment for children with no available travel vision"), § 300.39(a)(2)(ii) ("special education" includes "travel training"), § 300.39(b)(4) ("travel training" means "providing instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them" to "[d]evelop an awareness of the environment in which they live" and "[l]earn the skills necessary to move effectively and safely from place to place within that environment").

§ 1415(f)(3)(E)(i). "In matters alleging a procedural violation," the statute provides that "a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies" either "impeded the child's right to a free appropriate public education," "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education," or otherwise "caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii).

Following the conclusion of the due process hearing, and any state administrative appeal, see 20 U.S.C. § 1415(g), a "party aggrieved" by the administrative decision may bring a civil action in state or federal court, 20 U.S.C. § 1415(i)(2)(A). In such an action, the court must "receive the records of the administrative proceedings," "hear additional evidence at the request of a party," and "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C). These provisions authorize a broad array of relief for educational deprivations, including "reimbursement of the costs of private special-education services in appropriate circumstances." *Forest Grove Sch. Dist.*, 557 U.S. at 246. But the IDEA does not authorize the recovery of money damages. See *Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 471 U.S. 359, 370-371 (1985) (holding that tuition reimbursement is available specifically because that remedy is restitutionary and does *not* constitute damages); see also *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 254 (2009) (noting that the IDEA does "not allow for damages").

2. *The ADA and the Rehabilitation Act*—In contrast to the IDEA, the ADA and the Rehabilitation Act are antidiscrimination statutes that apply in and out of the school context. Title II of the ADA prohibits any state or local government entity from discriminating against a "qualified individual with a disability." 42 U.S.C. § 12132. The statute requires that, to avoid discrimination, such a public entity must make "reasonable modifications to rules, policies, or practices." 42 U.S.C. § 12131(2). See *Tennessee v. Lane*, 541 U.S. 509, 517 (2004). Congress authorized the Department of Justice (DOJ) to issue regulations implementing Title II of the ADA. 42 U.S.C. § 12134.

Because of the importance of service animals to ensuring equal access for many people with disabilities, DOJ has interpreted the statute's "reasonable modifications" language to require that, with certain exceptions not applicable here, "a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability," and that "[i]ndividuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go," 28 C.F.R. § 35.136(g) (2011).[2] This rule applies to all state and local government entities, and

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[2] The service animal regulation reflects the Department's longstanding interpretation of Title II's reasonable modifications requirement. See Statement of Interest of United States at 4-5 & n.5, *Alboniga v. School Bd. of Broward County*, No. 0:14-CV-60085-BB (S.D. Fla., filed Jan. 26, 2015), available at http://www.ada.gov/briefs/broward county_school_board_soi.pdf.

it does not require a showing of a particular *educational* need before an individual may invoke its protections. See 42 U.S.C. § 12131(1)(B) ("public entity" includes "any department, agency, special purpose district, or other instrumentality of a State or States or local government"); *Lane*, 541 U.S. at 530 (noting that "Title II applies not only to public education and voting-booth access but also to seating at state-owned hockey rinks").

Unlike the IDEA, ADA Title II provides for a judicial remedy in the first instance. As this Court has explained, "Title II's enforcement provision incorporates by reference § 505 of the Rehabilitation Act of 1973, 92 Stat. 2982, as added, 29 U. S. C. § 794a, which authorizes private citizens to bring suits for money damages." *Lane*, 541 U.S. at 517 See 42 U.S.C. § 12133 (incorporating Rehabilitation Act's remedial provisions). Individuals who have experienced discrimination may choose instead to file a complaint with DOJ or another federal agency designated to address ADA complaints, including the Department of Education's Office for Civil Rights (OCR). See 28 C.F.R. §§ 35.170, 35.171, 35.190. But there is no requirement that they do so before proceeding to court. See 28 C.F.R. § 35.172(d); see also *Cannon v. Univ. of Chicago*, 441 U.S. 677, 707 n.41 (1979) (rejecting exhaustion requirement under Title VI of the Civil Rights Act, whose remedies were incorporated by reference in the Rehabilitation Act, 29 U.S.C. § 794a(a)(2)); *Fitzgerald*, 555 U.S. at 255 (Title IX of the Education Amendments, which also incorporates Title VI's remedies, "has no administrative exhaustion requirement").

Section 504 of the Rehabilitation Act prohibits any entity "receiving Federal financial assistance" from discriminating against an "otherwise qualified individual with a disability" 29 U.S.C. § 794(a). As the overlap in the text indicates, Section 504 applies essentially the same substantive standards as ADA Title II. The Department of Education's Section 504 regulations provide that the failure to provide a free appropriate public education is *one way* a school can violate Section 504. See 34 C.F.R. § 104.33. But those regulations also incorporate general nondiscrimination prohibitions, like those in the ADA, that apply even when a school has provided a free appropriate public education. See 34 C.F.R. § 104.4. And because Title II specifically incorporated Section 504's remedial section, the relief available under the two statutes is identical. See 29 U.S.C. § 794a; 42 U.S.C § 12133. Thus, just as under the ADA, an individual who has experienced discrimination under Section 504 may file an administrative complaint with OCR, or that individual may proceed directly to court to sue for damages.

3. The Handicapped Children's Protection Act—In 1984, this Court addressed the interaction between the IDEA (then called the Education for All Handicapped Children Act and commonly abbreviated "EHA") and other statutes that protect the rights of children with disabilities. In *Smith v. Robinson*, 468 U.S. 992, 1009-1021 (1984), the Court held that the EHA provided "the exclusive avenue" for students with disabilities "to assert an equal protection claim to a publicly financed special education"—even if that claim arose under some other federal statute or the Constitution itself.

See *id.* at 1012-1013. Applying that rule, the Court concluded that the *Smith* plaintiff's Section 1983 and Section 504 claims were foreclosed by the EHA. See *id.* at 1009-1021.

Two years after *Smith*, Congress adopted the Handicapped Children's Protection Act to "reaffirm[] the viability of section 504 and other federal statutes such as 42 U.S.C. § 1983 as separate from but equally viable with EHA as vehicles for securing the rights of handicapped children and youth." H.R. Rep. No. 99-296, 99th Cong., 1st Sess. 6 (1985). In service of that goal, the HCPA amended the IDEA specifically to preserve educational-rights claims under the Constitution and other federal laws. In its current form, the relevant section of the HCPA provides:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws **seeking relief that is also available under this subchapter**, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1415(*l*) (emphasis added). This provision expressly preserves non-IDEA claims for the educational rights of children with disabilities, but it requires that, where a plaintiff "seek[s] relief that is

also available under" the IDEA, that plaintiff must first exhaust state administrative remedies under that statute.

B. The Facts

1. Respondents' Refusal to Permit E.F to Use Her Service Dog at School—Petitioner E.F. was born with cerebral palsy. BIO App. 1.[3] Her condition "significantly limits her motor skills and mobility," but it imposes no cognitive impairment. *Id.* at 1-2. In 2009, when she was five years old, E.F obtained a service dog prescribed by her pediatrician "to help her live as independently as possible." *Id.* at 2. The dog, named "Wonder," is a Goldendoodle—a breed with "a no-shedding or low-shedding coat" that is "generally tolerable to people with allergies to dogs." *Id.* at 7. With the help of fundraisers held by community members, E.F and her family were able to afford the "approximately $13,000" price tag to pay for Wonder's training. *Id.* at 6-7. Wonder was certified and trained to assist E.F "in a number of ways, including, but not limited to, retrieving dropped items, helping her balance when she uses her walker, opening and closing doors, turning on and off lights, helping her take off her coat, [and] helping her transfer to and from the toilet." *Id.* at 7.

Respondents Napoleon Community Schools and Jackson County Intermediate School District (collectively, the School District) refused to permit E.F.

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[3] Because the lower courts dismissed this case on the pleadings, all factual allegations in the complaint must be taken as true. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

to attend school with her service dog. *Id.* at 2. The School District reasoned that E.F 's IEP already required that a human aide give E.F one-on-one support, and "Wonder would not be able to provide any support the human aide could not provide." Pet. App. 4. See also BIO App. 8 ("The IEP states that [E.F 's] parents 'requested a service dog for their daughter to enhance her independence' and that the request was denied as [E.F 's] 'physical and academic needs are being met through the services/programs/ accommodations of the IEP '"). Because "an adult aide was performing the tasks the service animal would perform for the Student," Respondents "concluded that [E.F.] was receiving a FAPE" and refused to allow Wonder to come to school. J.A. 25.

As a result of that decision, E.F was forced to attend school without Wonder from October 2009 to April 2010. BIO App. 2. After her *pro bono* attorneys met with the School District's counsel, the parties began mediation. J.A. 25-26. Following that mediation, E.F was permitted to bring the dog to school "for a 30-day 'trial period' that began on April 12, 2010 and was extended through the end of the school year." BIO App. 8. But Respondents "refused to allow [E.F.] to use Wonder as a service dog during this trial period; rather, the dog was required to remain in the back of the room during classes, and was forbidden from assisting [E.F.] with many tasks he had been specifically trained to do." *Id.* Respondents also "refused to allow Wonder to accompany and assist [E.F.] during recess, lunch, computer lab, and library," and they did not allow Wonder to attend major activities such as field day and the school play *Id.* at 8-9. As the OCR later found, these limitations "in

effect prevent[ed] the service animal from serving the Student." J.A. 35.

Notably, Respondents at times refused to allow Wonder to assist E.F. with going to the toilet, thus requiring her to rely on human assistance in such an intimate and private act. J.A. 27 The Office for Civil Rights found that "[i]n order for [E.F.] to be allowed to use the service animal for toileting, the [Respondents] required that she demonstrate her use of the service animal while using the toilet, with the stall door open and four adults observing, which embarrassed her." *Id.*

After the trial period, Respondents refused to permit Wonder to accompany E.F to school at all. BIO App. 3, 9. As a result, the Fry family removed E.F from Respondents' school and homeschooled her using an online cybercharter curriculum for the next two years. Pet. App. 4; BIO App. 9.

2. The Fry Family's Pursuit of Relief Under the ADA and the Rehabilitation Act—In July 2010, the Fry family filed a complaint with OCR. J.A. 16. They alleged that the School District had violated the ADA and the Rehabilitation Act by refusing to permit E.F to use her service dog at school. *Id.* at 16-17. OCR investigated the complaint, and in May 2012 it issued a 14-page decision, which concluded that the School District had violated Title II of the ADA and Section 504 of the Rehabilitation Act. *Id.* at 18-19, 35-36.

In the OCR proceedings, Respondents took the position "that they are not required to permit the service animal to accompany and assis. the Student, because they are meeting all of the Student's *educational* needs through the provision of an aide."

Id. at 28 (emphasis added). Thus, the School District maintained, E.F "was receiving a FAPE" even without being allowed to use her dog. *Id.* at 35. But OCR observed that a school's obligations to a child with disabilities under the ADA and Section 504 extend beyond simply providing a free appropriate public education. See *id.* at 31-33. In particular, the agency noted that the ADA requires a public entity "to permit an individual with a disability to be accompanied by the individual's service animal in all areas of a public entity's facilities where members of the public; participants in services, programs, or activities; or invitees, as relevant, are allowed to go." *Id.* at 33.

Because E.F. relied on the service-animal and related nondiscrimination obligations under the ADA and Section 504, OCR determined that a "FAPE analysis" was inappropriate. *Id.* at 35. OCR found that even if the School District's refusal to permit Wonder to accompany E.F did not cause her any *educational* harm, that refusal limited her independence by requiring her to rely on human assistance to perform tasks at school. OCR noted that "a school district would violate the antidiscrimination requirements if it required a student who used a wheelchair to be carried or if it required a blind student to be led through the classroom by holding the arm of his teacher instead of permitting the student to use a service animal or a cane." *Id.* The agency concluded that Respondents' "assertions that the Student does not need her service animal for school, because they will provide her a human aide, similarly violate the antidiscrimination provisions of Section 504 and Title II." *Id.*

Despite OCR's findings, the School District continued to deny liability, and did not provide any backward-looking relief. J.A. 36-37 But it did "agree[] to permit [E.F.] to attend school with Wonder starting in fall 2012." Pet. App. 4. Petitioner Brent Fry, E.F.'s father, then reached out to Respondent Barnes, the Principal of Ezra Eby Elementary, to discuss E.F.'s return to school. BIO App. 10. Based on that discussion, E.F.'s parents developed "serious concerns that the administration would resent [E.F.] and make her return to school difficult." *Id.* The Fry family thus decided to remove E.F. from Respondents' schools permanently and "found a public school in Washtenaw County"—a neighboring jurisdiction—"where the principal and staff enthusiastically welcomed [E.F.] and Wonder and saw their presence as an opportunity to promote the inclusion of students with disabilities within the school." *Id.* at 10-11. E.F. continues to attend the Washtenaw County public schools, see *id.* at 11, and the Fry family now lives in Washtenaw County as well.

In December 2012, E.F., by and though her parents as next friends, filed this suit "seeking damages for the school's refusal to accommodate Wonder between fall 2009 and spring 2012." Pet. App. 4-5. The lawsuit claimed that the School District's actions violated Title II of the ADA and Section 504 of the Rehabilitation Act, and it sought damages for the social and emotional harm those actions caused E.F., as well as declaratory relief and attorneys' fees. BIO App. 11-12.[4]

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[4] The lawsuit also included a state-law claim, BIO App. 19-21, but the district court declined to exercise supplemental jurisdiction over that claim. See Pet. App. 5.

The district court dismissed the suit for failure to exhaust state administrative remedies under the IDEA. Pet. App. 37 A divided panel of the Sixth Circuit affirmed. Pet. App. 1. The majority specifically recognized that "the Frys seek money damages, a remedy unavailable under the IDEA." Pet. App. 17 But despite the HCPA's text, which limits exhaustion to cases "seeking relief that is also available under" the IDEA, 20 U.S.C. § 1415(*l*), the majority held that "this does not in itself excuse the exhaustion requirement," because otherwise plaintiffs could "evade" that requirement "simply by appending a claim for damages." Pet. App. 17 (internal quotation marks omitted). The panel held that exhaustion is required "when the injuries alleged can be remedied through IDEA procedures, or when the injuries relate to the specific substantive protections of the IDEA." Pet. App. 6. Because it concluded that the "core harms" alleged by E.F "relate to the specific educational purpose of the IDEA," and that she "could have used IDEA procedures to remedy these harms," the panel concluded that the complaint was properly dismissed for failure to exhaust. *Id.*

Judge Daughtrey dissented. Pet. App. 21. She specifically noted a conflict between the majority's decision and the Ninth Circuit's decision in *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 874-875 (9th Cir 2011) (*en banc*), cert. denied, 132 S. Ct. 1540 (2012), which "held [that] '[n]on-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, *even if they allege injuries that could conceivably have been redressed by the IDEA*.'" Pet. App. 28 (quoting *Payne*, 653 F.3d at 871 (emphasis in Judge Daughtrey's dissent)).

The court denied *en banc* review, though Judge Daughtrey stated that she would have granted rehearing. Pet. App. 53-54.

SUMMARY OF ARGUMENT

A. The interpretation adopted by the Sixth Circuit, which Respondents ask this Court to adopt, cannot be squared with the text of the HCPA. This Court has repeatedly emphasized, most recently in *Ross v. Blake*, 136 S. Ct. 1850 (2016), that statutory exhaustion provisions must be rigorously applied according to their text. Thus, the Court has explained, courts may not rewrite those provisions to impose extra-statutory exceptions to exhaustion, nor may they impose extra-statutory limitations on a plaintiff's right to proceed directly to court.

The HCPA requires exhaustion only for a "civil action" that is "seeking relief that is also available under" the IDEA. 20 U.S.C. § 1415(*l*). By its plain terms, that text requires exhaustion only when a plaintiff who has filed a non-IDEA claim actively demands a form of relief that the IDEA actually empowers its administrative proceedings to provide. The IDEA empowers administrative hearing officers to provide relief only to redress deprivations of educational benefits, relief that Petitioners do not seek, and it does not authorize them to provide damages, relief that Petitioners do seek. By hypothesizing about the relief Petitioners "could have" sought, rather than looking to what their "civil action" was actually "seeking," the Sixth Circuit disregarded the plain statutory text.

B. The HCPA's text reaffirms the presumptive rule of administrative law that exhaustion is not required where administrative proceedings cannot provide the relief the plaintiff seeks. This Court has recognized certain well-established exceptions to the exhaustion requirement. One of these exceptions excuses exhaustion when it would prove futile, and the Court has confirmed that the futility exception applies under the IDEA. See *Honig v. Doe*, 484 U.S. 305, 327 (1988). In the absence of contrary statutory text, the Court has repeatedly applied the futility exception to excuse exhaustion when administrative proceedings cannot provide the relief the plaintiff specifically requested in his or her complaint. See *McCarthy v. Madigan*, 503 U.S. 140 (1992); *Greene v. United States*, 376 U.S. 149 (1964). Congress is free to depart from these holdings—as it did, for example, in the Prison Litigation Reform Act (PLRA). But the HCPA's text, by requiring exhaustion only when a plaintiff's "civil action" is "seeking relief that is also available under" the IDEA, makes clear that Congress reaffirmed the background futility principle here. The HCPA's legislative history confirms that conclusion. So does the statute's purpose—to overturn this Court's *Smith* decision and make clear that claims brought under the Constitution and other federal statutes protecting the rights of children with disabilities could proceed to court independently.

C. Applying the HCPA according to its plain terms will protect disabled children and their parents from burdensome and time-consuming delays in vindicating their rights. Although the Department of Education's regulations set what looks like a brisk timeline for IDEA administrative proceedings, the reality is very

different. In cases in which administrative proceedings can provide disabled children and their parents the relief they seek, requiring a first resort to those proceedings advances the interest in giving local officials the opportunity to set educational policy in the first instance while also giving children and parents robust procedural protections. But where the administrative proceedings cannot provide the relief children and parents seek, requiring exhaustion merely delays the vindication of rights protected by other statutes. Congress was fully entitled to conclude that this burden would outweigh the marginal benefit that administrative proceedings would have by narrowing disputes and creating factual records in those cases in which the proceedings could not grant the relief plaintiffs seek.

D. Because Petitioners' lawsuit did not seek relief available under the IDEA, the Sixth Circuit erred in requiring exhaustion. Petitioners brought this case under the ADA and the Rehabilitation Act, not the IDEA. Respondents have consistently maintained that, because E.F could learn just as well with a human aide as she could when accompanied by Wonder, the school did not violate the IDEA. Petitioners have not contested that conclusion. Rather, Petitioners argue that the refusal to allow E.F. to be accompanied by her service dog deprived her of independence at school, including in such intimate activities as going to the bathroom. Petitioners seek damages for the resulting emotional harm, as well as a declaration that Respondents violated E.F 's rights under the ADA and Rehabilitation Act and attorneys' fees for vindicating those rights. Not one of these three forms of relief is available under the IDEA, and Petitioners do not allege

any educational deprivation of the sort that is redressable in IDEA proceedings in any event. Accordingly, by the plain terms of the HCPA, the Sixth Circuit should not have required exhaustion.

ARGUMENT

THE SIXTH CIRCUIT ERRED BY AFFIRMING THE DISMISSAL OF THIS CASE FOR FAILURE TO EXHAUST

From the outset of this dispute, Respondents took the position that their refusal to permit Wonder to act as a service dog did not deprive E.F of educational benefits in violation of the IDEA. Petitioners do not contest that conclusion. Rather, Petitioners' position is, and has always been, that even if the use of a human aide allowed E.F to experience sufficient *educational* benefits to satisfy the IDEA, the refusal to admit Wonder denied E.F. independence at school and constituted discrimination at a public facility in violation of the ADA and the Rehabilitation Act. When the Fry family filed suit to enforce E.F 's rights under the ADA and Rehabilitation Act, however, the School District insisted that the family first file an administrative complaint under the IDEA—even though both parties *agree* that the School District did not violate the IDEA, and even though IDEA proceedings *cannot* provide the relief the Fry family seeks in its ADA and Rehabilitation Act suit. Respondents' position cannot be squared with the text of the HCPA. That text makes clear that the ADA and Rehabilitation Act create causes of action that are independent from the IDEA—indeed the entire purpose of the HCPA was to reaffirm the independence of such statutes—and that ADA and Rehabilitation Act

plaintiffs need not exhaust administrative proceedings under the IDEA unless their "civil action" is one "seeking relief that is also available" in those administrative proceedings. 20 U.S.C. § 1415(*l*). Because the Sixth Circuit disregarded the HCPA's plain text, its judgment should be reversed.

A. The HCPA's Text Makes Clear That Exhaustion of IDEA Remedies is Required Only Where Plaintiffs Who Bring Non-IDEA Claims Actually Seek Relief That is Also Available in IDEA Proceedings

1. The Text Requires Exhaustion Only When the Plaintiff Actively Requests a Form of Relief that IDEA Proceedings Can in Fact Provide

This Court "always say[s]" that statutory interpretation "begins with the text." *Ross*, 136 S. Ct. at 1857. That is especially true when interpreting statutory provisions requiring exhaustion of administrative remedies. Under such provisions, "Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to." *Id.* "Time and again, this Court has taken such statutes at face value—refusing to add unwritten limits onto their rigorous textual requirements." *Id.*

The Court has made clear that adherence to the text "runs both ways: The same principle applies regardless of whether it benefits the [plaintiff] or the [defendant]." *Id.* at 1857 n.1. The Court has thus "overturned judicial rulings that imposed extra-statutory limitations on a [plaintiff's] capacity to sue." *Id.* In *Jones v. Bock*, 549 U.S. 199, 203 (2007), for example, the Court reversed lower-court decisions under the Prison Litigation Reform Act (PLRA) "that required an

inmate to demonstrate exhaustion in his complaint, permitted suit against only defendants named in the administrative grievance, and dismissed an entire action because of a single unexhausted claim." *Ross*, 136 S. Ct. at 1857 n.1 (describing *Jones*). "'[T]hese rules,' [the Court] explained, 'are not required by the PLRA,' and 'crafting and imposing them exceeds the proper limits on the judicial role.'" *Id.* (quoting *Jones*, 549 U.S. at 203). And in *Ross* itself, the Court remanded to require the Fourth Circuit to enforce the limitation on the PLRA's exhaustion mandate that is "baked into its text: An inmate need exhaust only such administrative remedies as are 'available.'" *Id.* at 1862 (quoting 42 U.S.C. § 1997e(a)).

These holdings apply fundamental legal principles. Because Congress created federal statutory causes of action, and gave the federal courts jurisdiction to hear cases arising under its statutes, this Court has long recognized that "'a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with [congressional] intent.'" *Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 580 (1989) (quoting *Patsy v. Florida Board of Regents*, 457 U.S. 496, 501-502 (1982)). Congressional intent is best determined by the statutory text. See *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (internal quotation marks omitted). When it comes to actions enforcing federal civil rights in particular, the Court has recognized that, absent clear statutory text requiring exhaustion of administrative remedies, such actions "*belong in court*," "exist independent of any

other legal or administrative relief that may be available as a matter of federal or state law," and "are judicially enforceable *in the first instance*." *Felder v. Casey*, 487 U.S. 131, 148 (1988) (internal quotation marks omitted; emphasis in original).

By its plain text, the HCPA requires exhaustion only when a plaintiff who has filed a non-IDEA claim affirmatively demands a form of relief that the IDEA actually empowers its administrative proceedings to provide. The relevant provision of the HCPA does two things: First, it expressly preserves non-IDEA claims "under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities." 20 U.S.C. § 1415(*l*). Second, it provides that "before the filing of a civil action under such laws *seeking relief that is also available* under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter." *Id.* (emphasis added).

The two crucial terms in that text are "seeking relief" and "also available." One cannot "seek" a form of relief unless one actively asks for it.[5] And, as this

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[5] See Webster's Ninth New Collegiate Dictionary (1984) (definitions of "seek" include: "[t]o go in search of; look for"; "[t]o ask for: request"; "[t]o try to acquire or gain: aim at"); American Heritage Dictionary of the English Language (William Morris ed., 1981) (definitions of "seek" include: "[t]o endeavor to obtain or reach"; "[t]o inquire for; request"); Webster's Third New International Dictionary of the English Language, Unabridged (Philip Babcock Gove ed. 1968) (definitions of "seek" include: "[t]o go in search of; look for; search for"; "[t]o inquire for; ask for;

Court's decisions interpreting the PLRA's exhaustion provision have made clear, relief is not "available" in administrative proceedings unless those proceedings are actually, and not merely hypothetically, capable of providing it. The Court has explained that "the ordinary meaning of the word 'available' is '"capable of use for the accomplishment of a purpose,' and that which 'is accessible or may be obtained.'"" *Ross*, 136 S. Ct. at 1858 (quoting *Booth v. Churner*, 532 U.S. 731, 737-738 (2001) (itself quoting Webster's Third New International Dictionary (1993))). When "an administrative remedy, although officially on the books, is not capable of use to obtain relief," it is not an "available" remedy. *Ross*, 136 S. Ct. at 1859.

By limiting exhaustion to "civil actions . seeking relief that is also available" under the IDEA, the HCPA thus "contains its own, textual exception to mandatory exhaustion." Cf. *Ross*, 136 S. Ct. at 1858 (discussing the PLRA). In particular, the HCPA's text makes clear that exhaustion of non-IDEA claims is not required unless the plaintiff's complaint (which defines the

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entreat; request"; "[t]o try to acquire or gain; aim at"); Oxford English Dictionary (James A.H. Murray et al. eds., 1961) (definitions of "seek" include: "to go in search or quest of; to try to find, look for"; "[t]o try to obtain (something advantageous); to try to bring about or effect (an action, condition, opportunity, or the like)"; "[t]o ask for, demand, request (*from* a person)"); Webster's New International Dictionary of the English Language (William Allan Neilson et al. eds., 2d ed. 1958) (definitions of "seek" include: "[t]o inquire for, to ask for; request"; "[t]o try to acquire or gain; to strive after as an aim"); Webster's New World Dictionary of the American Language (Encyclopedic ed. 1951) (definitions of "seek" include: "[t]o try to find; search for; look for"; "[t]o ask or inquire for"; "[t]o try to get or acquire; aim at; pursue").

scope of the "civil action") actually requests (is "seeking") relief that the IDEA actually empowers hearing officers to provide (is "available under this subchapter"). The IDEA authorizes hearing officers to grant relief only if the alleged violation deprived the child of educational benefits. See 20 U.S.C. § 1415(f)(3)(E); pp. 4-5, *supra*. And the IDEA does not empower hearing officers to award money damages. See p. 5, supra; BIO 6, 20 (conceding that "the IDEA does not allow for an award of general money damages"). As Judge Bybee explained for the *en banc* Ninth Circuit, "whether a plaintiff *could have* sought relief available under the IDEA is irrelevant—what matters is whether the plaintiff *actually* sought relief available under the IDEA." *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 875 (9th Cir. 2011) (*en banc*) (emphasis in original), cert. denied, 132 S. Ct. 1540 (2012). See also *Moore v. Kansas City Pub. Sch.*, 2016 WL 3629086, at *4 (8th Cir. July 7, 2016) (agreeing with *Payne*).

2. By Hypothesizing About the Relief Petitioners "Could Have" Sought, Rather Than the Relief the Complaint Actually Sought, the Sixth Circuit Disregarded the Statutory Text

Rather than looking to the relief the Fry family actually sought in their ADA and Rehabilitation Act lawsuit, the Sixth Circuit panel majority held that exhaustion was required because the family "could have" sought *different* relief in the IDEA process. Pet. App. 15. The majority specifically recognized that "the Frys seek money damages, a remedy unavailable under the IDEA." Pet. App. 17 But it made no effort to confront—much less reconcile its decision with—the

HCPA's "seeking relief that is also available" language. Instead, it referred to "clear policy justifications" for requiring exhaustion (Pet. App. 8), concluded that "this policy justification would be threatened if parties could evade IDEA procedures by bringing suit contesting educational accommodations under other causes of action" (Pet. App. 9), and suggested that refusing to require exhaustion for claims that sought money damages would allow plaintiffs to "evade the exhaustion requirement" (Pet. App. 17). "Accordingly," the panel majority said, "it makes sense to require IDEA exhaustion in order to preserve the primacy the IDEA gives to the expertise of state and local agencies." Pet. App. 9-10.

The Sixth Circuit erred in both its premise and its conclusion. First, the court's policy-based concern about allowing parents to evade exhaustion of IDEA claims simply by seeking damages has no application where the plaintiffs seek damages, not for the denial of a free appropriate public education, but for distinct and independent violations of Section 504 and the ADA. As we show in Section D, *infra*, this case does not involve the denial of a FAPE. Second, as we show in Section C, *infra*, the panel majority ignored important policy concerns that cut against its holding. Third, and most important, the policy balance was one for Congress to strike—not one to be decided based on what "makes sense" to judges.

As this Court explained just last Term, courts have a degree of policy freedom when applying "judge-made exhaustion doctrines." *Ross*, 136 S. Ct. at 1857. "But a statutory exhaustion provision stands on a different footing." *Id.* Where, as here, Congress has delimited

the scope of exhaustion, it has "foreclos[ed] judicial discretion." *Id.* When a court applies "not a judge-made doctrine but a statutory requirement," it "must honor Congress's choice." *Id.* (internal quotation marks omitted). Expanding *or* contracting the scope of an exhaustion requirement mandated by Congress "exceeds the proper limits on the judicial role." *Jones*, 549 U.S. at 203. The Sixth Circuit panel majority ignored that principle when it held that the HCPA, which by its terms demands exhaustion only for an action "seeking relief that is also available under" the IDEA, 20 U.S.C. § 1415(*l*), required exhaustion even for actions that do not seek any such relief.

Defending the Sixth Circuit's decision, Respondents argue that reading the HCPA according to its terms "privileges form over substance." Resp. Supp. Br. 6. "The better view," they assert, "is that '[t]he nature of the claim and the governing law determine the relief no matter what the plaintiff demands.'" *Id.* (quoting *Charlie F v. Board of Educ. of Skokie Sch. Dist.*, 98 F.3d 989, 992 (7th Cir. 1996)). They rely on this Court's statement in a recent ERISA decision that "whether the remedy a plaintiff seeks is legal or equitable depends on the basis for the plaintiff's claim and the nature of the underlying remedies sought." *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 657 (2016) (internal quotation marks and alterations omitted); see Resp. Supp. Br. 6-7. But this Court's decision in *Montanile*, far from supporting Respondents, cuts decisively against them. Here, the *claim* that Petitioners are asserting does not arise under the IDEA, and does not seek the FAPE that the IDEA was designed to ensure. Moreover, the *Montainile* Court

specifically held that even if the underlying basis for a *claim* was equitable, the plaintiff could not proceed under the relevant ERISA provision if the *remedy* sought was a legal one. See *Montanile*, 136 S. Ct. at 658. That, of course, is the situation here, where Petitioners seek a damages remedy that the IDEA does not authorize. And, in sharp contrast to the Sixth Circuit's reliance on policy concerns, the *Montanile* Court rejected the plaintiff's argument that allowing a suit would serve "ERISA's objectives"; it instead insisted that "'[v]ague notions of a statute's "basic purpose" are inadequate to overcome the words of its text regarding the *specific* issue under consideration.'" *Id.* at 661 (quoting *Mertens v. Hewitt Associates*, 508 U.S. 248, 261 (1993)) (emphasis in original).

The HCPA's text is clear. Exhaustion is required only if a plaintiff is "seeking relief that is also available under" the IDEA procedures. 20 U.S.C. § 1415(*l*). But Respondents and the Sixth Circuit "read[] the word 'seeking' out of the statute, transmuting it into something like 'even if not seeking.'" Mark C. Weber, Special Education Law and Litigation Treatise § 21.8 at 21:99 n.266 (3d ed. 2008). This Court has made clear that courts must "give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted); see also *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1132 (2015) (applying rule against surplusage); *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1357 (2015) (Alito, J., concurring in the judgment) (same). The Sixth Circuit's disregard of the statutory text warrants reversal.

B. The HCPA Reaffirms the Presumptive Rule of Administrative Law That Exhaustion is Not Required Where Administrative Proceedings Cannot Provide the Relief the Plaintiff Seeks

1. The HCPA's Text Codifies an Aspect of the Well-Established Futility Exception

By making clear that exhaustion of non-IDEA claims is not required unless plaintiffs "seek[] relief that is also available" under the IDEA, 20 U.S.C. § 1415(*l*), the HCPA reaffirmed basic administrative law principles. Cf. *Ross*, 136 S. Ct. at 1863 (Breyer, J., concurring in part) (arguing that a statutory exhaustion regime presumptively "include[s] administrative law's 'well-established exceptions to exhaustion'") (quoting *Woodford v. Ngo*, 548 U.S. 81, 103 (2006) (Breyer, J., concurring in the judgment). A well-established exception to the exhaustion requirement exists "when exhaustion would prove 'futile.'" *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000). The text of the HCPA itself contemplates that the IDEA's exhaustion requirement contains exceptions, by requiring administrative proceedings to be exhausted only "to the same extent as would be required had the action been brought under this subchapter " 20 U.S.C. § 1415(*l*). Two years after Congress enacted the HCPA, this Court confirmed that the futility exception applies under the IDEA, so that "parents may bypass the administrative process where exhaustion would be futile or inadequate." *Honig v. Doe*, 484 U.S. 305, 327 (1988).

In the absence of statutory text to the contrary, this Court has repeatedly applied the futility exception to excuse exhaustion when the administrative process

cannot provide the relief the plaintiff seeks in court. In *McCarthy v. Madigan*, 503 U.S. 140 (1992), for example, a federal prisoner filed suit to challenge unconstitutional prison conditions without first exhausting the Bureau of Prisons' administrative grievance process. "On the first page of his complaint, [the plaintiff] wrote: 'This Complaint seeks Money Damages Only.'" *McCarthy*, 503 U.S. at 142. The Court held that a federal prisoner "seeking only money damages" need not exhaust the grievance process before filing suit in federal court. *McCarthy*, 503 U.S. at 152. The Court's opinion concluded that the administrative remedy was futile based on two factors: first, the "short, successive filing deadlines" in the administrative process; and, second, that "the administrative 'remedy' does not authorize an award of monetary damages—the only relief requested by McCarthy in this action." *McCarthy*, 503 U.S. at 152. Chief Justice Rehnquist, joined by Justices Scalia and Thomas, concurred in the judgment. He agreed that exhaustion was not required, but his conclusion was "based entirely on the fact that the grievance procedure at issue does not provide for any award of monetary damages." *Id.* at 156 (Rehnquist, C.J., concurring in the judgment). Because that procedure would therefore be ineffective "in cases such as this one where prisoners seek monetary relief," Chief Justice Rehnquist found it "improper to impose an exhaustion requirement." *Id.*[6]

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[6] *Congress overturned McCarthy*'s holding as to prisoner suits in the PLRA, 42 U.S.C. § 1997e(a). But Congress did not alter the basic administrative law principles on which *McCarthy* relied. As we show *infra*, the text of the HCPA is decisively different than that of the PLRA.

The Court applied the same principles in *Greene v. United States*, 376 U.S. 149 (1964). There, the plaintiff filed a suit seeking restitution for the improper cancellation of his security clearance in 1953; the government argued that he should have exhausted proceedings under a 1960 regulation that provided administrative remedies for the denial of security clearances. See *id.* at 162-163. Under the 1960 regulation, administrative relief was not available unless the claimant could show "that he would be currently entitled to a security clearance." *Id.* at 153 (internal quotation marks omitted). But the *Greene* plaintiff had left national-security-related employment after 1953 and did not seek a new clearance. Because "petitioner, who had to find nonsecurity employment as a result of the 1953 clearance revocation, does not now require and is not seeking current access authorization," the Court held that exhaustion of the procedures established by the 1960 regulation was not required. *Id.* at 163-164.

In both *McCarthy* and *Greene*, the plaintiffs could hypothetically have obtained relief in the administrative process. The plaintiff in *McCarthy*, who was still incarcerated when he filed suit, alleged an ongoing failure to provide adequate treatment for pain following spinal surgery, as well as a failure to place him in a single cell. See Brief for Petitioner at 4, *McCarthy v. Madigan*, 1991 WL 530833. Even if it could not provide monetary relief for past harms, a successful grievance could have led to a change in his medical care or a cell transfer. And the plaintiff in *Greene* could certainly have sought to demonstrate his eligibility for a security clearance under the 1960 regulation. In both cases, it was sufficient that the

plaintiffs' suits *did not in fact seek* relief available in the administrative process; whether they *could have obtained* some form of administrative relief was irrelevant. See *McCarthy*, 503 U.S. at 154 ("[W]e cannot presume, as a general matter, that when a litigant has deliberately forgone any claim for injunctive relief and has singled out discrete past wrongs, specifically requesting monetary compensation only, that he is likely interested in 'other things.'"); *Greene*, 376 U.S. at 164 ("[W]e do not suggest that if petitioner were now seeking access to security-classified information, he would be entitled to have his clearance qualifications judged by other than current regulations. But all he seeks are damages for the Government's unauthorized action and to this much, we hold, he is certainly entitled."). *A fortiori*, it would be futile to require Petitioners to exhaust an administrative procedure designed to ensure that Respondents provide E.F with a FAPE when E.F does not challenge the failure to provide her with a FAPE and, in any event, is no longer attending Respondents' schools. It is not for a defendant to say what form of relief a plaintiff could (or even, in the defendant's opinion, should) have requested; that is a choice for the plaintiff.

Congress, of course, is free to depart from these general administrative law principles. See *Ross*, 136 S. Ct. at 1856-1857. That is precisely what Congress did in the PLRA. There, Congress responded to this Court's decision in *McCarthy* by providing that "[n]o action shall be brought with respect to prison conditions * * * by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are

exhausted." 42 U.S.C. § 1997e(a). As this Court observed in *Booth v. Churner*, 532 U.S. 731, 738-739 (2001), the text of the PLRA's exhaustion provision refers generally to "such administrative remedies as are available," rather than requiring the availability of any particular form of relief as a prerequisite for exhaustion. Because the text makes clear "that Congress meant to preclude the *McCarthy* result" in the prison context, *id.* at 740, the Court concluded that the PLRA requires prisoners now to exhaust *any* administrative remedies that are available, "irrespective of the forms of relief sought," *id.* at 741 n.6.

But the HCPA employs very different language than does the PLRA. Unlike the PLRA, the HCPA does not require exhaustion of all available administrative remedies, but only of available administrative remedies that the plaintiff is "seeking" in his or her "civil action." 20 U.S.C. § 1415(*l*). The HCPA's text thus reaffirms and codifies the futility principles applied in *McCarthy* and *Greene*

2. The Plain Meaning of the HCPA's Text is Consistent With the Statute's History and Purpose

The difference in text between the HCPA and the PLRA is matched by a difference in the statutes' histories and purposes. This Court has explained that Congress enacted the PLRA "to reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). By contrast, Congress enacted the HCPA to *expand* access to federal courts for children with disabilities asserting violations of their rights—and to overturn this Court's *Smith* decision that channeled such cases into the IDEA (then

called the EHA) process. See H.R. Rep. No. 99-296, 99th Cong., 1st Sess. 4-5 (1985); S. Rep. No. 99-112, 99th Cong., 1st Sess. 2 (1985).

In his speech introducing the HCPA, Senator Lowell Weicker specifically criticized *Smith* for denying parents "direct access to the district courts to enforce rights under section 504 of the Rehabilitation Act even where immediate injunctive relief," which he said was "not available under" the EHA, "may be critical." 130 Cong. Rec. 20,598 (July 24, 1984). The bill as originally introduced contained no provision that specifically discussed exhaustion. As relevant here, the bill simply provided that "[n]othing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes prohibiting discrimination." S. 415, 99th Cong., 1st Sess. § 3 (as introduced Feb. 6, 1985); H.R. 1523, 99th Cong., 1st Sess. § 3 (as introduced Mar. 7, 1985). That provision directly overturned *Smith*. But it said nothing about whether children with disabilities or their parents would be required to exhaust EHA remedies before filing their non-EHA claims in court.

In the committee hearings on the bill, witnesses representing the National School Boards Association (NSBA) called attention to the lack of an exhaustion provision.[7] In line with Respondents' argument, the

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[7] See *Handicapped Children's Protection Act: Hearing Before the Subcomm. on Select Education of the House Comm. on Education & Labor*, 99th Cong., 1st Sess. 24 (Mar. 12, 1985) (hereinafter "HCPA House Hearing") (statement of Jean Arnold, Esq.); *Handicapped Children's Protection Act of 1985: Hearing Before the*

NSBA urged Congress to adopt a broad exhaustion requirement, under which children with disabilities and their parents could not file a lawsuit under Section 504—or even file a Section 504 complaint with the OCR—if the EHA administrative process could provide *any* relief.[8] In support of that proposed rule, the NSBA pointed to a statement in the *Smith* dissent, which somewhat ambiguously suggested requiring "a plaintiff with a claim covered by the EHA to pursue relief through the administrative channels established by that Act before seeking redress in the courts under § 504 or § 1983." *Smith*, 468 U.S. at 1024 (Brennan, J., dissenting). See HCPA Senate Hearing 75 (written statement of the NSBA citing this language from the *Smith* dissent).

The relevant House and Senate committees added exhaustion language, but they did not adopt the NSBA's broad proposal. Instead, as reported in both the House and the Senate, the bill included an

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Subcomm. on the Handicapped of the Senate Comm. on Labor & Human Resources, 99th Cong., 1st Sess. 75 (May 16, 1985) (hereinafter "HCPA Senate Hearing") (written statement of the NSBA).

[8] See HCPA House Hearing 27 (statement of Jean Arnold, Esq.) ("NSBA further requests that the bill be clarified to provide that handicapped student plaintiffs may resort to Section 504 only where the EHA does not protect the rights of and provide remedies to the handicapped individual. * * * To provide otherwise would allow handicapped plaintiffs to forego the administrative procedures in the EHA and file a complaint, either with OCR or a court, under Section 504."); *id.* at 38 (Arnold expressing agreement with Rep. Bartlett's statement that "in those cases in which 94-142 [the EHA] is applicable, you would prohibit the bypass of the [administrative] due process [procedures]").

exhaustion provision with the same "seeking relief that is also available" language that appeared in the bill as ultimately adopted. See S. 415, 99th Cong., 1st Sess. § 4 (as reported July 25, 1985); H.R. 1523, 99th Cong., 1st Sess. § 3 (as reported Oct. 2, 1985). Both the House and Senate committee reports made clear an intent to codify the futility exception and to affirm that exhaustion would not be required if administrative proceedings could not provide the relief a parent or child was seeking in court. The Senate Report stated that exhaustion would be required "when a parent brings suit under another law"—but only when "*that suit* could have been brought under the EHA." S. Rep. No. 99-112, *supra*, at 3 (emphasis added). A bipartisan group of senators elaborated that parents bringing a non-EHA suit must exhaust "if that suit could have been filed under the EHA," but that exhaustion would not be required "when resort to [EHA] proceedings would be futile." *Id.* at 15 (additional statement of Sens. Hatch *et al.*). If a parent filed a suit seeking a remedy that EHA administrative proceedings could not have provided, that parent plainly could not have filed "that suit" under the EHA, and administrative remedies would be futile under background administrative law principles. In the floor debate, Senator Paul Simon—a member of the committee and of the bipartisan group of senators who signed the additional statement—made the point explicit. He explained that "[w]hen parents choose to file suit under another law that protects the rights of handicapped children, if that suit could have been filed under the Education of the Handicapped Act, parents are required to exhaust the administrative remedies" but that exhaustion would not be required "where the

hearing officer lacks the authority to grant the relief sought." 131 Cong. Rec. 21,392-21,393 (July 30, 1985).

The House Report, too, was explicit on the point. It stated that exhaustion would be required before parents filed a non-EHA suit "where exhaustion would be required under EHA and the relief they seek is also available under EHA." H.R. Rep. No. 99-296, *supra*, at 7 Elaborating on the futility principles that generally apply in determining the scope of exhaustion requirements, the report explained that "it is not appropriate to require the use of due process and review procedures set out in section 615(b) and (c) of EHA before filing a law suit" where "the hearing officer lacks the authority to grant the relief sought." *Id.*[9]

When it adopted the HCPA, then, Congress chose to incorporate language that codified the futility principle excusing exhaustion when the administrative forum lacks power to grant the relief a plaintiff seeks in court—the same principle this Court applied in *McCarthy* and *Greene*. Codifying that principle was fully consistent with the overall thrust of the HCPA—to overturn *Smith* and reaffirm that the federal civil rights of students with disabilities, under statutes like the Rehabilitation Act and Section 1983, provided an independent cause of action that might be asserted regardless of whether a claim under the IDEA was available.

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[9] The House Report also explained, as the text of the exhaustion provision makes clear, that the statute would not require exhaustion of EHA remedies before filing an administrative complaint under the Rehabilitation Act with OCR. See *id.* at 7-8.

The Sixth Circuit's holding, which defers court access for ADA and Rehabilitation Act claims until after exhaustion of IDEA proceedings even when the plaintiffs cannot receive the relief they seek in the administrative forum, directly undermines that purpose. See *Payne*, 653 F.3d at 875 (describing such a holding as "treat[ing] § 1415(*l*) as a quasi-preemption provision, requiring administrative exhaustion for any case that falls within the general 'field' of educating disabled students" and as thus being "inconsistent with the IDEA's exhaustion provision"). That holding "is easier to reconcile with the Supreme Court's decision in *Smith v. Robinson*, which held that the law that is now IDEA preempted Section 504 and Section 1983-equal protection remedies, than with the Handicapped Children's Protection Act, which overruled *Smith*." Weber, *supra*, § 21.8 at 21:21.

C. The HCPA's Plain Text Avoids Subjecting Disabled Children and Their Parents to Burdensome, Time-Consuming Delays in Cases Where IDEA Proceedings Cannot Grant Them the Relief They Seek

The Sixth Circuit panel majority concluded that parents could too easily evade the exhaustion requirement if they could avoid exhaustion "simply" by limiting their requested relief to a claim for damages. Pet. App. 17 (internal quotation marks omitted). The majority noted that, even where an administrative adjudication cannot provide the relief the petitioner seeks in court, exhaustion *might* provide the petitioner other relief that she finds satisfactory and *might* help to create a record that would assist judicial review. See Pet. App. 10. The short answer to that argument is that it is properly made to Congress. Indeed, as the

previous section shows, such an argument *was* made to Congress, but Congress rejected it. The HCPA specifically requires exhaustion only for "civil actions" that are "seeking relief that is also available under" the IDEA. 20 U.S.C. § 1415(*l*). Under that language, it is precisely the relief the plaintiff "seek[s]" that determines whether exhaustion is required. Even if there might have been good policy justifications for imposing a broader exhaustion requirement, it is not up to the courts to expand that requirement beyond the limits imposed by Congress. See Section A, *supra*.

In any event, just as with debates over exhaustion under 42 U.S.C. § 1983, "the relevant policy considerations do not invariably point in one direction, and there is vehement disagreement over the validity of the assumptions underlying many of them." *Patsy*, 457 U.S. at 513. The HCPA, as Congress wrote it, serves an important policy goal: It avoids burdening disabled children and their parents with the futile obligation to undergo time-consuming administrative proceedings before pursuing claims that present issues distinct from the questions of educational benefit relevant under the IDEA, and that seek forms of relief IDEA proceedings cannot provide. The Sixth Circuit's rule, by contrast, imposes wasteful and burdensome delays.

This Court has itself noted that Congress "[r]ecogniz[ed]" that IDEA "proceedings might prove long and tedious." *Honig*, 484 U.S. at 324. Respondents nonetheless assert that IDEA administrative proceedings "provide[] a fast, efficient way to redress [disabled students'] injuries." BIO 19. Respondents point to formal statutory and regulatory

deadlines that, if followed, would ensure that administrative proceedings would conclude within 105 days of filing a due process complaint. BIO 18. Under those deadlines, a due process hearing would take place within 30 days of the filing of the complaint, 20 U.S.C. § 1415(f)(1)(B)(ii), the hearing officer would issue a decision within the next 45 days, 34 C.F.R. § 300.515(a), and the state educational agency would issue a decision on any administrative appeal within 30 days following a request for review, 34 C.F.R. § 300.515(b). Reliance on those formal deadlines is misleading.

Despite the timeline set by the relevant statutory and regulatory provisions, researchers have long noted that in practice "such quick resolution almost never occurs. In discussions with attorneys for children with disabilities, as well as school district attorneys, the refrain echoes—'never saw it happen.'" Mary A. Lunch, *Who Should Hear the Voices of Children with Disabilities: Proposed Changes in Due Process in New York's Special Education System*, 55 Alb. L. Rev. 179, 184 (1991). One experienced administrative adjudicator and scholar explained in 2005 that "[t]he hearings, which are supposed to take 45 days from filing to decision, are getting more and more contentious, complex, and time-consuming." Perry A. Zirkel, *The Over-Legalization of Special Education*, 195 Ed. Law Rep. 35, 37 (2005). He found it "increasingly easy to find hearings that have, comparable to major civil or criminal litigation, taken session after session and month after month." *Id.*

In 2013, the American Association of School Administrators (AASA) observed that "the length of

time needed to schedule and complete a due process hearing, and render a decision on the issues at hand, can significantly delay a remedy for the student." See American Ass'n of School Administrators, Rethinking Special Education Due Process 15 (April 2013), https://perma.cc/XNT6-2E7J. AASA specifically noted that "[w]hile Congress mandated that due process hearings be concluded within a 45-day timeline, in practice, this is rarely the case." *Id.* And even with changes to the administrative process in recent years, "advocates for both families and school districts" continue to find that process "expensive" and "time consuming." Elizabeth A. Shaver, *Every Day Counts: Proposals to Reform IDEA's Due Process Structure*, 66 Case W Res. L. Rev 143, 159 (2015).[10]

The reason that the administrative process is so time-consuming is straightforward: IDEA due process proceedings are not an informal means of alternative dispute resolution. Rather, "[d]ue process hearings are

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[10] Respondents report that "[a]ccording to one study, the average duration of due process proceedings filed between 2000 and 2006 lasted only 52 days." BIO 18 (citing Perry A. Zirkel *et al.*, *Creeping Judicialization in Special Education Hearings? An Exploratory Study*, 27 J. Nat'l Ass'n Admin. L. Judiciary 27, 39 (2007)). Respondents fail to disclose that the study on which they rely was limited to a single state—Iowa—which the study's authors noted "is known for a relatively proactive general and special education system" and "had relatively few [due process] decisions" during the study period. *Id.* at 34. A recent GAO report, by contrast, finds a lack of good quantitative data on the timeliness of IDEA administrative hearings, but concludes that available measures understate the problem of delay. GAO, Special Education: Improved Performance Measures Could Enhance Oversight of Dispute Resolution 23-26 (Aug. 2014), http://www.gao.gov/assets/670/665434.pdf.

court proceedings in almost every relevant sense," with pleading and evidentiary requirements to match. Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. Nat'l Ass'n Admin. L. Judiciary 423, 450 (2012). As attorneys from the very firm that represents Respondents in this Court explained, such formal procedures mean that "due process does not lend itself to quick resolution of any dispute, unless both parties genuinely desire such a resolution." Kevin J. Lanigan *et al.*, *Nasty, Brutish, and Often Not Very Short: The Attorney Perspective on Due Process*, Rethinking Special Education for a New Century 213, 219, 227 (Chester E. Finn *et al.*, eds., 2001); see also *id.* at 213 (noting that the chapter's conclusions "are based primarily on the particular experiences of Hogan & Hartson attorneys in representing parties on both sides of special education disputes") (footnote omitted). And "[e]ven in cases in which the parties are motivated only by the desire to obtain the best possible services for the student, the drawn-out nature of due process hearings may diminish the importance of the final decision. By the time a decision is reached, which can take months to years, the award granted to a prevailing parent is often a hollow victory." Cali Cope-Kasten, *Bidding (Fair)well to Due Process: The Need for A Fairer Final Stage in Special Education Dispute Resolution*, 42 J.L. & Educ. 501, 513 (2013)). To require parents to undergo these time-consuming and futile proceedings before even getting into the door of the one forum that can grant them relief imposes a significant burden without sufficient justification.

Where parents and children seek redress for educational deprivations of the sort the IDEA

addresses, and they seek a form of relief IDEA procedures can provide, requiring a first resort to the administrative process balances two interests: (1) the interest in giving local officials the opportunity to set educational policy in the first instance, see *Rowley*, 457 U.S. at 206; and (2) the interest in ensuring that disabled children and their parents have robust procedural protections against the deprivation of their rights, see *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 530-533 (2007); *Honig*, 484 U.S. at 323-325; *Rowley*, 457 U.S. at 205-206.

But when a school district has violated a child's rights under a statute *other* than the IDEA, and the relief the child and her parents seek either does not relate to educational adequacy or is not of a form that IDEA proceedings can provide—as is the case here—requiring a first resort to the administrative process imposes cost and delay without clearly advancing the interests that generally underlie the exhaustion requirement. Congress was fully entitled to determine that the marginal benefit of avoiding some disputes and sharpening the record for judicial review in others did not justify the significant burden an exhaustion requirement would place on parents and children when the administrative process could not provide the relief they sought.

To be sure, Congress could have balanced the relevant interests differently, but it did not. The same conclusion the Court reached about Section 1983 exhaustion applies here: "The very difficulty of these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable."

Patsy, 457 U.S. at 513. If today's Congress believes that it got the balance wrong when it enacted the HCPA, it is free to amend the statute. As we explained in Section B, *supra*, Congress followed precisely that course in the PLRA, which responded to the Court's *McCarthy* decision by imposing a broad exhaustion requirement for suits brought by prisoners. Congress has repeatedly amended the IDEA and its predecessor statute. The HCPA itself was framed as an amendment to the EHA's procedural-rights section, 20 U.S.C. § 1415, and Congress has amended that section multiple times since the HCPA's 1986 enactment—including major statutory reauthorizations in 1990, 1997, and 2004.[11] But Congress has never altered the HCPA's "seeking relief that is also available" language. By essentially taking matters upon itself to alter that language, the Sixth Circuit panel majority erred.

D. Because the Fry Family's ADA and Rehabilitation Act Lawsuit Did Not Seek any Relief Available Under the IDEA, the Lower Courts Erred in Requiring Exhaustion

1. None of the Relief Requested in the Fry Family's Complaint is Also Available in IDEA Proceedings

Under the plain language of the HCPA, this case should not have been dismissed for failure to exhaust. The Fry family brought this case under the ADA and Rehabilitation Act, not under the IDEA. The family

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[11] See Pub. L. No. 108-446 § 101, 118 Stat. 2647 (2004); Pub. L. No. 106-25 § 6, 113 Stat. 41 (1999); Pub. L. No. 105-17 § 101, 111 Stat. 37 (1997); Pub. L. No. 101-476, 104 Stat. 1103 (1990); Pub. L. No. 100-630 § 102(e), 102 Stat. 3289 (1988).

did not claim that the refusal to permit Wonder to accompany E.F to school denied E.F a "free appropriate public education." 20 U.S.C. § 1412(a)(1). Respondents had specifically determined that, because the school offered the services of a human aide, E.F was not deprived of sufficient educational benefits to violate the IDEA. See pp. 11-13, *supra*. The Fry family does not contest that conclusion. As Judge Daughtrey explained in her dissent below, "the Frys' complaint does not tie use of the service dog to [E.F.'s] academic program or seek to modify her IEP in any way " Pet. App. 26. The complaint does not allege any harm to E.F.'s education or any ongoing harm to her development. It does not allege any educational deprivation of the sort that is redressable in the IDEA proceedings. See 20 U.S.C. § 1415(f)(3)(E) (IDEA proceedings provide remedies for denials of free appropriate public education or other deprivations of educational benefits). Rather, the complaint seeks to redress the past social and emotional harm that E.F experienced when she was denied the use of her service dog at school. See BIO App. 11-12.

Because it focuses on past social and emotional harms, the Fry family's complaint seeks one principal form of relief: "damages in an amount to be determined at trial." BIO App. 21 (prayer for relief). It also seeks two ancillary forms of relief on Petitioners' federal claims: (1) "a declaration stating that Defendants violated Plaintiff's rights under Section 504 of the Rehabilitation Act, [and] Title II of the Americans with Disabilities Act"; and (2) "attorneys' fees pursuant to the Rehabilitation Act, the Americans with Disabilities Act, [and] 42 U.S.C. § 1988." *Id.*

None of these forms of relief is available under the IDEA. The IDEA does not provide for damages. See p. 5, *supra*. Nor does the IDEA grant state administrative adjudicators the authority to issue a declaration that a school district violated some *other* statute like the ADA or the Rehabilitation Act. Cf. 20 U.S.C. § 1415(f)(3)(E) (hearing officer may decide whether child received a free appropriate public education and was accorded certain related procedural protections under the IDEA), § 1415(k)(3) (hearing officer may decide whether child's misconduct was a manifestation of a disability and whether maintaining the child's current placement is substantially likely to lead to injury). And although the IDEA provides for attorneys' fees, it provides only for fees "[i]n any action or proceeding brought under" the IDEA itself. 20 U.S.C. § 1415(*i*)(3)(B)(i). Here, the complaint seeks attorneys' fees, not for IDEA proceedings, but instead for the effort to enforce E.F 's distinct rights under the ADA and the Rehabilitation Act. Because none of the relief requested in the complaint is "relief that is also available" under the IDEA, 20 U.S.C. § 1415(*l*), the lower courts erred in dismissing this case for failure to exhaust.

2. This Case Does Not Turn on the Same Questions That Would Have Determined the Outcome in IDEA Proceedings

The Sixth Circuit asserted that this "suit turns on the same questions that would have determined the outcome of IDEA procedures." Pet. App. 10-11. It thus concluded that "the legal injury alleged [was] in essence a violation of IDEA standards." Pet. App. 20. By the plain terms of the statute, however, it is

irrelevant whether the lawsuit would "turn[] on the same questions" as IDEA proceedings or on whether a court might determine that the injury alleged in the suit was "in essence" an IDEA violation. The only question is whether the suit is "seeking relief that is also available" in IDEA proceedings. 20 U.S.C. § 1415(*l*). Because none of the forms of relief the Fry family is seeking in this suit would be available under the IDEA, exhaustion was not required.

In any event, this suit does *not* turn on the same questions that would have determined the outcome of IDEA proceedings. To prevail in IDEA proceedings, E.F would have had to show that Respondents' refusal to allow her to bring Wonder to school denied her a "free appropriate public education" or otherwise "caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E). The IDEA requires schools to permit the use of a service animal in some circumstances as a "related service[]," but it does so only when that is "required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26)(A). And although the IDEA sometimes requires a school to *teach* a disabled child to use a service animal, see pp. 3-4, *supra*, E.F did not seek instruction in how to use her dog. She simply wanted Respondents to permit Wonder to accompany her at school.

Throughout this dispute, Respondents have maintained the position that the refusal to permit Wonder to accompany E.F did *not* deprive E.F of educational benefits. Respondents noted that E.F 's IEP already "included a human aide providing one-on-one support," and they concluded that "Wonder would

not be able to provide any support the human aide could not also provide." Pet. App. 4. See pp. 11-13, *supra*.

The Fry family does not take issue with Respondents on this point. But that means that Petitioners could not have obtained *any* of the forms of relief that Respondents assert were available in IDEA proceedings. Petitioners could not have obtained any of the "wide ranging remedies for denials of FAPE" to which Respondents point (BIO 14, 31-33), for the simple reason that no party maintains that E.F was denied a free appropriate public education. See generally *Forest Grove Sch. Dist.*, 557 U.S. at 239 (IDEA vests "broad authority to grant 'appropriate' relief, including reimbursement for the cost of private special education when a school district fails to provide a FAPE"); *Burlington Sch. Comm.*, 471 U.S. at 369-371 (reimbursement of parental expenses may be required as a remedy when a school district denies a free appropriate public education).[12]

The Fry family brought this suit under the ADA and the Rehabilitation Act precisely because those statutes, unlike the IDEA, do not require a showing of any *educational* deprivation. To prevail in this lawsuit, all E.F. would have to show is that she was denied the right, guaranteed to any person with a disability, to be

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[12] There is no issue of private-school reimbursement here for an independent reason: When the Fry family removed E.F from Respondents' school, they first enrolled her in a public cybercharter, and then in a brick-and-mortar public school in a neighboring county. Accordingly, there is no private-school tuition to reimburse.

accompanied by her service dog in a public facility. See 28 C.F.R. § 35.136. That the refusal to admit the dog took place at a school—rather than a recreation center, public library, or public park—does not change the elements of the claim. Indeed, the ADA and Rehabilitation Act issue here is the same issue that would be presented if E.F. had not been a student at Respondents' schools but instead had been an audience member at a school play. Because nothing in the ADA and Rehabilitation Act claims require any analysis of pedagogical or education-policy questions, resolution of those claims will present questions regarding the application of civil rights law of a sort that federal judges address every day. Any asserted educational expertise of IDEA hearing officers (cf. BIO 18) offers no reason to require exhaustion.[13]

3. This Case Seeks No Change to an IEP

Respondents assert (Resp. Supp. Br 7-8 n.2) that E.F.'s IEP would likely have to be modified if she prevailed on her ADA and Rehabilitation Act claims. There is no basis for such an assertion. As Judge Daughtrey noted in her dissent below, "the request for a service dog would not require a modification of [E.F.'s] IEP, because that request could be honored

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[13] Indeed, because this lawsuit challenges violations of the ADA and Section 504 requirements that go beyond the requirement to provide a free appropriate public education, it is questionable whether exhaustion would have been required even under *Smith*. See *Smith*, 468 U.S. at 1121 ("We do not address a situation where the EHA is not available or where § 504 guarantees substantive rights greater than those available under the EHA."). The Sixth Circuit's decision thus arguably went beyond *Smith*—the case Congress overturned in the HCPA.

simply by modifying the school policy allowing guide dogs to include service dogs." Pet. App. 27 (emphasis in original). A school district can comply with a general policy allowing all students with disabilities to be accompanied by their service dogs without writing that policy into any individual student's IEP

Even if a successful ADA and Rehabilitation Act suit might have led Respondents to consider modifying E.F.'s IEP had she stayed in the district, that does not transform the ADA and Rehabilitation Act claims into IDEA claims. And this suit does not seek any prospective change to the IEP in any event. Indeed, it is unlikely that the Fry family would even have standing to seek such prospective relief. By the time they filed suit, they had removed E.F. from Respondents' schools and had enrolled her in a public school in a neighboring county, with no intention of returning. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). Since that time, the Fry family has moved to a new residence in that neighboring county, so Petitioners have no ongoing educational dispute with Respondents.

As a result, there are two reasons why the hypothesis that this suit might have led to a change in E.F.'s IEP did not require exhaustion: First, this lawsuit is not seeking—and by the rules of standing likely cannot seek—an order to change the IEP Second, a prospective change to E.F.'s IEP would not have been "available" in IDEA administrative proceedings even if she had remained in Respondents' district, because E.F. alleged no ongoing *educational* harm. Cf. *Ross*, 136 S. Ct. at 1858-1859

(administrative remedy is not "available" if it is merely formally, but not actually, capable of use).[14]

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In the end, the Sixth Circuit's ruling and Respondents' argument would put parents in an untenable position. If a school maintained that its actions did not violate the IDEA because they did not deprive a child of a FAPE, and the parents agreed with that assertion, the parents could not challenge the school's actions under the entirely independent causes of action created by the ADA and the Rehabilitation Act without first bringing an administrative action under the IDEA. In the administrative proceedings, the parents would face a choice. They could acknowledge that the district did not deprive their child of a FAPE, thus waiving any basis for relief. Such a waiver would, of course, vitiate any purpose for following the exhaustion requirement. Alternatively, the parents could go through the motions of pressing the argument that the district did deprive their child of a FAPE, even though they believed that argument to

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[14] For the same reasons, Respondents are wrong to suggest that the complaint's boilerplate request for "any other relief this Court deems appropriate," BIO App. 21, means that the Fry family has necessarily sought relief available under the IDEA. Cf. BIO 30. Because Petitioners no longer live in the district, and allege no ongoing educational harm, their lawsuit cannot seek any remedy other than the retrospective damages (and accompanying declaratory and fees relief) sought in the complaint—relief that Respondents concede is not available in IDEA proceedings. And the absence of an ongoing educational dispute means that prospective remedies would not be "available" in IDEA proceedings in any event.

lack a sound foundation. But that course of action would raise serious ethical questions—and would, at a minimum, unnecessarily extend proceedings and increase the lawyers' bills on both sides.

Congress wisely did not put parents to that dilemma. It provided instead that parents could proceed directly to court on claims that arise under statutes that create independent causes of action, so long as their "civil action" does not "seek[]" relief available in IDEA proceedings. 20 U.S.C. § 1415(*l*). Congress could properly trust that parents would not choose to bypass an IDEA remedy if it would truly serve their children. As this Court has noted, "parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled." *Rowley*, 458 U.S. at 209. Because the Fry family's "civil action" did not "seek[] relief that is also available under" the IDEA, 20 U.S.C. § 1415(*l*), the lower courts should not have dismissed it for failure to exhaust.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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